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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HERSEY LEE LELAIND, Defendant and Appellant.	A124227 (Solano County Super. Ct. No. FC49530)

A jury found defendant Hersey Lee Lelaind to be a sexually violent predator (SVP) and the court committed him for an indeterminate term to the California Department of Mental Health (Department) for appropriate treatment and confinement in a secure facility. (Welf. & Inst. Code, §§ 6600, 6604.) Defendant, with the assistance of appointed counsel, appeals the commitment order. Defendant contends that (1) his commitment for an indeterminate term is a violation of the federal and state constitutions' due process, equal protection, ex post facto, and double jeopardy provisions (U.S. Const., art. I, § 9, cl. 3, 5th & 14th Amends.; Cal. Const., art. I, §§ 7 subd. (a), 9, 15); (2) the clinical evaluators who found that he met SVP criteria and recommended that the local district attorney file a commitment petition did so under assessment standards that did not comply with California administrative law governing the adoption of state agency regulations; and (3) he should be given a new trial because the prosecution's expert witness acknowledged after trial that she was wrong about one fact she used in forming her opinion that defendant is an SVP.

We reject the contentions and affirm the commitment order. First, defendant's commitment under the SVP law is constitutional. The law satisfies due process standards in requiring proof beyond a reasonable doubt of mental illness and dangerousness for commitment and in limiting commitment to the duration of those conditions. There is no equal protection violation in the disparate treatment of SVPs and others civilly committed for mental illness because they are not similarly situated groups, and the SVP law is a civil, not a criminal statute, and thus the constitutional ban on ex post facto legislation and double jeopardy is inapplicable. Second, the Department's use of assessment standards without formally adopting the standards as regulations did not prejudice defendant. Any procedural irregularity in the Department's use of a clinical screening process that found defendant to be a possible SVP was harmless given the jury's legal determination, upon substantial evidence, that defendant is an SVP. Third, the prosecution witness's mistake about a single fact used in forming her opinion does not require a new trial because the mistake was revealed during the trial and the corrected information did not change the witness's opinion that defendant is an SVP.

I. FACTS AND PROCEDURAL HISTORY

In 1999, defendant was accused of continuous sexual abuse of his sister. (Pen. Code, § 288.5, subd. (a).) At the time, defendant was 18 years old and his sister was 10 years old. Defendant pleaded no contest to the lesser offense of committing a lewd or lascivious act upon a child, and was sentenced to serve three years in prison. (Pen. Code, § 288, subd. (a).) Defendant was paroled in April 2002 but returned to custody after violating parole.

In 2006, shortly before defendant's release date, the Department of Corrections and Rehabilitation identified defendant as a possible SVP and referred him for psychological evaluation. (Welf. & Inst. Code, § 6601, subd. (a)(1).) Two clinical psychologists diagnosed defendant with pedophilia and an antisocial personality disorder, and opined that he was likely to engage in sexually violent predatory criminal behavior without appropriate custody and treatment. (Welf. & Inst. Code, § 6601, subds. (c) &

(d).) The psychologists concluded that defendant meets the criteria for involuntary commitment as an SVP. In March 2007, the Solano County District Attorney filed a petition for commitment of defendant. (Welf. & Inst. Code, § 6601, subd. (i).) A superior court judge reviewed the petition, held an evidentiary hearing at which the psychologists testified, and found probable cause to believe that defendant was likely to engage in sexually violent predatory criminal behavior if released. (Welf. & Inst. Code, § 6602, subd. (a).) The probable cause determination was made in October 2007, and defendant was held for trial.

In December 2008, shortly before trial was set to begin, defendant filed a motion to dismiss the commitment petition. Defendant, through appointed counsel, argued that the petition was based on psychological evaluations performed under assessment standards that did not comply with California administrative law governing the adoption of state agency regulations, so the SVP proceedings "are a nullity." The People argued that the assessment standards were not regulations requiring formal adoption and, even if they were, the SVP proceedings were valid because the superior court made an independent determination that probable cause existed to believe that defendant is an SVP. The court denied the motion.

A jury trial was held in January 2009. The People presented the testimony of Dawn Starr, Ph.D., one of the two clinical psychologists who evaluated defendant when he was first identified as a possible SVP. Starr interviewed defendant, conducted tests, and reviewed his medical and social histories, which included his conviction for molesting his sister and other sexual contact with children. Starr found that defendant's sexual misconduct began at about age nine, and included rubbing his penis against the buttocks of his younger brother, an 18-month-old boy, and a foster sister. At age 15, defendant assaulted his ten-year-old foster brother. At age 18 he repeatedly molested his 10-year-old sister, and in his 20s he had sex with teenage girls and was found in violation of parole for being in the company of two boys. Starr believed (mistakenly) that the boys were eight years old. Starr opined that defendant is a sociopathic pedophile and likely to engage in sexually violent predatory behavior without treatment and custody.

The defense presented two psychologists who disagreed with Starr's opinion. Bruce Abbott, Ph.D., testified that defendant is not a pedophile, does not have a mental disorder, and is not an SVP. Abbott attributed defendant's conduct to "sexual acting act" in response to childhood trauma. Abbott also pointed out that Starr was incorrect in believing that defendant was with eight-year-old boys when he was found in violation of parole. In fact, the boys were 17 years old. Like Abbott, Karen Franklin, Ph.D., opined that defendant is not a pedophile. A third defense witness testified that she was only 16 or 17 years old when she had sex with defendant, who was then age 23, but that the encounter was consensual and not coerced.

The jury found that defendant is an SVP. The court denied defendant's motion for a new trial and committed him to Coalinga State Hospital for treatment and confinement for an indeterminate term. Defendant timely appealed.

II. DISCUSSION

At least 21 states have statutes permitting involuntary commitment of sexual predators. (*Kennedy v. Louisiana* (2008) ___ U.S. ___, 128 S.Ct. 2641, 2670.) California defines an SVP as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst. Code, § 6600, subd. (a)(1) [all further section references are to this code except as noted].) California's SVP law was enacted in 1996, and originally provided for two-year terms of confinement of a person a jury found beyond a reasonable doubt to be an SVP. (*People v. Williams* (2003) 31 Cal.4th 757, 764.) Our California Supreme Court upheld the constitutionality of the original SVP law against due process, equal protection, and ex post facto challenges. (*Id.* at pp. 759-760, 777, fn. 13; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1151-1179.)

The SVP law was amended in 2006 to provide for an indeterminate term of commitment, rather than renewable two-year terms. (*People v. Medina* (2009)

171 Cal.App.4th 805, 812-813 (*Medina*).) "Because the term of commitment is indeterminate, the district attorney no longer has to prove at regular intervals, beyond a reasonable doubt, that the person remains an SVP. Instead, the Department must examine the person's mental condition at least once a year and must report annually on whether the person remains an SVP. (§ 6605, subd. (a).) If the Department determines the person is no longer an SVP, the director of the Department must authorize the person to petition the court for unconditional discharge. (§ 6605, subd. (b).) The person is thereafter discharged from his or her indeterminate commitment unless, at a hearing, the district attorney proves beyond a reasonable doubt that the person is still an SVP. (§ 6605, subds. (c)-(e).) [¶] The only other avenue for release from confinement under the amended [SVP Act, or] SVPA is a petition under section 6608. Under this section, a person committed as an SVP, after at least a year of commitment, may petition for conditional release or unconditional discharge without the recommendation or concurrence of the director of the Department. (§ 6608, subds. (a), (c).) If the court determines that the petition is not frivolous, a hearing is held at which the petitioner has the burden of proof by a preponderance of the evidence. (§ 6608, subds. (a), (i).) If the petitioner demonstrates that he or she is no longer an SVP, the petitioner is placed in a conditional release program for one year, after which a new hearing is conducted. (§ 6608, subd. (d).) The petitioner must be unconditionally released if, at the second hearing, the court is persuaded that he or she is not an SVP, using the same standard of proof. (§ 6608, subds. (d), (i).) Following the denial of a section 6608 petition, an SVP may not file another petition for at least one year. (§ 6608, subd. (h).)" (*Id.* at p. 813.)

A. The amended SVPA is constitutional

The amendment of the SVP law establishing indeterminate terms of confinement has led to renewed constitutional challenges. As defendant acknowledges, many intermediate court of appeal opinions have addressed those challenges and held the amended SVPA to be constitutional. Most of those opinions are under review in our Supreme Court. (E.g., *People v. McKee* (2008) 160 Cal.App.4th 1517, review granted April 22, 2008, S162823.) Meanwhile, the Fourth District Court of Appeal has

considered the matter and, in a published opinion that remains valid precedent, held that the amended law is constitutional. (*People v. Taylor* (2009) 174 Cal.App.4th 920, 928-931, 934-937 (*Taylor*).) We agree with *Taylor*, and reject defendant's constitutional claims.

1. Due process

Defendant argues that the amended SVP law violates due process by imposing an indefinite term of civil commitment and placing the burden of proof on the adjudged SVP to demonstrate that he or she is no longer an SVP to obtain release. Civil commitment "constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425.) Due process is satisfied if a mentally impaired person is confined to protect others "provided the confinement takes place pursuant to proper procedures and evidentiary standards." (*Kansas v. Hendricks* (1997) 521 U.S. 346, 357.) "[T]o commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 75-76.) A person civilly committed "may be held as long as he is both mentally ill and dangerous, but no longer." (*Id.* at p. 77.)

The amended SVPA meets these due process standards. As the *Taylor* court noted: "The amendments to the SVPA provide for involuntary commitment upon a showing of dangerousness due to mental illness by proof beyond a reasonable doubt. This standard is more demanding than the clear and convincing standard required under federal due process principles." (*Taylor, supra,* 174 Cal.App.4th at p. 931.) The SVPA also safeguards against the risk that an individual may be held in a continuing commitment even though he or she is no longer mentally ill and dangerous. "[T]he procedures built into the amended SVPA mitigate that risk by providing annual mental health evaluations and procedures by which an individual may seek discharge." (*Id.* at p. 930.) "The fact that the amendments shift the burden to each defendant to show they

are no longer suffering from a mental illness rendering them dangerous to the public does not invalidate the statutory scheme. Adequate safeguards, including annual evaluations, are built in to insure against indefinite detention of [SVPs] who are no longer mentally ill or dangerous to others." (*Id.* at p. 931.)

2. Equal protection

Defendant claims the amended SVPA violates equal protection principles by treating SVPs differently from other persons subject to commitment for mental illness. "A person may be subject to involuntary commitment for mental illness under various statutory provisions." (*Taylor, supra,* 174 Cal.App.4th 920, 935.) SVPs alone are subject to indeterminate commitment. (*Ibid.*) But SVPs present heightened danger and have unique treatment needs different from others committed for mental illness. " 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) SVPs and others civilly committed for mental illness are not similarly situated groups, and thus their disparate treatment is not an equal protection violation. (*Taylor, supra,* 174 Cal.App.4th 920, 935-936.)

3. Ex post facto and double jeopardy

Defendant maintains that the SVPA is a criminal, not a civil statute, and violates the constitutional ban on ex post facto legislation and double jeopardy applicable to criminal statutes. "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by [the United States Supreme Court] that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." (*Collins v. Youngblood* (1990) 497 U.S. 37, 41.) The prohibition on ex post facto laws means that "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Id.* at p. 43.) The double jeopardy clause is likewise limited to criminal prosecution and punishment. The double jeopardy clause precludes "a second prosecution for the same offense" and prevents "the State from 'punishing twice, or

attempting a second time to punish criminally, for the same offense.' " (*Kansas v. Hendricks, supra*, 521 U.S. at p. 369.) Defendant argues that the SVPA violates the constitutional ban on ex post facto legislation and double jeopardy by retroactively increasing the punishment for his criminal offense to include involuntary commitment as an SVP, and by prosecuting and punishing him twice for his criminal offense.

The argument fails because the SVPA is civil in nature, not criminal. The United States Supreme Court has held that a Kansas sexual predator law is civil and thus outside the scope of ex post facto and double jeopardy concerns. (*Kansas v. Hendricks, supra,* 521 U.S. at pp. 370-371.) California's SVPA is likewise "civil in nature. It does not impose liability or punishment for criminal conduct; instead, a person found to be an SVP is committed to a state hospital for treatment of the mental disorder that prevents him or her from controlling his or her sexually violent criminal behavior." (*Taylor, supra,* 174 Cal.App.4th at p. 936.) The SVPA is not punitive and thus "principles of former jeopardy and ex post facto do not apply." (*Id.* at p. 937.)

A. Defendant was not prejudiced by the use of clinical assessment standards that were not formally adopted as administrative regulations

The Administrative Procedure Act (APA) "requires every administrative agency guideline that qualifies as a 'regulation,' as defined by the APA, to be adopted according to specific procedures. (Gov. Code, § 11340.5, subds. (a), (b).) The Office of Administrative Law (OAL) is charged with, among other functions, enforcing this requirement. (Gov. Code, §§ 11340.2, 11340.5, subd. (b).)" (*Medina, supra,* 171 Cal.App.4th at p. 813.)

In August 2008, the OAL found that provisions of the Department assessment protocol used to evaluate potential SVPs are invalid or " 'underground' " regulations adopted without APA compliance. (*Medina, supra,* 171 Cal.App.4th at pp. 813-814.) The OAL found only that the protocol did not comply with California administrative law governing how state agencies adopt regulations; it did not evaluate the clinical value or substantive merit of the protocol. (2008 OAL Determination No. 19, p. 1.) Following the OAL determination, the Department adopted emergency regulations to support its

assessment protocol. (Cal. Code Regs., tit. 9, § 4000 et seq.) However, the use of a non-APA-compliant protocol in the SVP screening process prior to 2009 has generated claims, like the one made here, that SVP judgments are invalid.

Division One of this District Court of Appeal has rejected such a claim. (*Medina, supra,* 171 Cal.App.4th at pp. 813-820; accord *People v. Glenn* (2009) 178 Cal.App.4th 778, 802-814.) We concur. We will assume, as did the *Medina* court, that the OAL was correct in finding that the assessment protocol was an invalid underground regulation. (*Medina* at p. 815, fn. 4; see *In re Ronje* (Nov. 19, 2009, G041373) ___ Cal.App.4th ___, 209 WL 3858606 [finding the protocol invalid].) But we also find, as did the *Medina* court, that defendant was not prejudiced by the use of an invalid regulation in the screening process. (*Medina* at pp. 819-820; accord G*lenn* at pp. 812-814.) Whatever procedural irregularity occurred in the Department's use of a clinical screening process that found defendant to be a possible SVP was harmless given the jury's later legal determination, upon substantial evidence, that defendant is an SVP.

The purpose of the clinical assessment "is not to identify [SVPs] but, rather, to screen out those who are not [SVPs]. 'The Legislature has imposed procedural safeguards to prevent meritless petitions from reaching trial. "[T]he requirement for evaluations is not one affecting disposition on the merits; rather it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so." ' [Citation.] The legal determination that a particular person is an SVP is made during the subsequent judicial proceedings, rather than during the screening process." (*Medina, supra,* 171 Cal.App.4th at p. 814.) Once a petition is filed, the People cannot rely on the evaluations but must show " 'the more essential fact' " that the defendant is an SVP. (*People v. Glenn, supra,* 178 Cal.App.4th at p. 814.)

Defendant claims he was prejudiced by the procedurally invalid assessment protocol because the protocol recommended risk assessment under an outdated actuarial tool, the Static-99, rather than the later Static-2002, and that the risk assessment carried over from the initial clinical evaluation to trial. Defendant maintains that "the failure of

[the Department] to have public and professional input on its evaluation process, as required of proper regulations, deprived the jury in [his] trial of the benefit of having the People's witness present the latest information." But the People's witness, Starr, did present the latest information to the jury. The protocol recommends use of the Static-99 but permits use of additional actuarial instruments and encourages a balanced risk assessment that considers multiple factors. In assessing the risk that defendant would engage in sexually violent criminal behavior, Starr used both the Static-99 *and* the Static-2002. She testified at length, on both direct examination and cross-examination, about both actuarial tools in explaining why she believed defendant presented a substantial risk. Contrary to defendant's argument on appeal, the challenged assessment protocol did not "force[]" Starr to rely on "an outdated instrument known as the Static-99," and she did not do so. Defendant has failed to demonstrate any prejudice from the Department's use of a non-APA compliant screening protocol.

C. The motion for new trial was properly denied

Defendant contends that he is entitled to a new trial because Starr acknowledged after trial that she was wrong about one fact she used in forming her opinion that defendant is an SVP. Starr diagnosed defendant as a pedophile and assessed a high risk of recidivism based, in part, on defendant's history of inappropriate contact with children and multiple parole violations. In describing defendant's history to the jury, Starr stated that defendant was found in violation of parole in February 2003 for conversing with two eight-year-old boys. Starr testified that defendant's multiple parole violations demonstrates that defendant "does not have control over his sexual desires."

Starr was mistaken about the age of the boys. Defense witness Abbott pointed out that Starr was incorrect in believing that defendant was with eight-year-old boys when defendant was found in violation of parole—the boys were actually 17 years old. Abbott acknowledged that defendant's contact with minors, of whatever age, was a violation of parole and showed lack of control but opined that the age of the boys undermined Starr's diagnosis of pedophilia. Defense counsel emphasized that point in closing argument to the jury, noting Starr's error in believing the boys were eight years old and calling

defendant's conversation with the teenage boys "a technical violation" that fails to support "a pedophilic diagnosis."

After the jury returned its verdict finding defendant to be an SVP, defendant moved for judgment notwithstanding the verdict. The court denied the motion but, in doing so, expressed concern about the factual inaccuracy Starr relied upon concerning defendant's 2003 parole violation. The court observed that Starr "indicated that one of the factors she considered was the fact that [defendant], while out on parole, had been with two eight-year-old boys when in fact it was later brought out after that witness was excused that that incident involved two 17-year-old boys, so whether or not that changes her opinion or not, I do not know, but it would have been her opinion upon which the jury based its verdict."

Defendant moved for a new trial claiming insufficiency of the evidence to support the verdict. (Code Civ. Proc., § 657, subd. (6).) At the court's suggestion, defense counsel had contacted Starr and corrected her misunderstanding of the 2003 parole violation. Starr responded that her opinion was "[n]ot as strong as before" but the information "was not enough to change" her opinion. In opposing the new trial motion, the People noted that the jury had the correct information about the parole violation during trial and that Starr confirmed, after receiving the information, that her opinion that defendant is an SVP was unchanged. The court agreed with the People's evaluation of the evidence and denied the motion for a new trial.

On appeal, defendant maintains that his motion for a new trial was wrongly denied because the diminishment in the strength of Starr's opinion is newly discovered evidence that should be presented in a new trial. (Code Civ. Proc., § 657, subd. (4).) Defendant failed to present that ground for a new trial below, as the People note. In any event, a new trial in not warranted on either basis, neither insufficiency of the evidence nor newly discovered evidence.

The evidence was sufficient to support the verdict finding defendant to be an SVP. Defendant has a long history of sexual misconduct and parole violations. His parole violation for conversing with boys—whether age 8 or 17—was a minor incident that did

not form a substantial basis for Starr's opinion nor the People's case as a whole. The correction of one factual inaccuracy concerning a minor incident does not undermine Starr's opinion nor the other evidence supporting the jury's verdict.

There is also no newly discovered evidence. The specifics of the parole violation are not new evidence. The age of the boys was presented during trial, after Starr was excused as a witness. Starr's slightly modified opinion, formed after learning the true age of the boys, does not constitute newly discovered evidence because that evidence was available to the defense and could have been produced at trial by recalling Starr and asking for clarification of her opinion after the parole violation details were corrected. In any event, the slight modification of Starr's opinion was insignificant. The 2003 parole violation was not a major factor relied upon by Starr in reaching her opinion that defendant is an SVP, and Starr reaffirmed her opinion when the correct information about the parole violation was brought to her attention after trial. Moreover, the jury knew of Starr's mistake concerning the parole violation and had every opportunity to weigh the value of her opinion in light of the correct information. The defense, through witness testimony and argument of counsel, maintained that Starr's error in believing the boys were eight years old undermined Starr's diagnosis of pedophilia. The jury considered that testimony and argument in weighing Starr's opinion and in finding defendant to be an SVP. No new trial is necessary to consider the matter further.

Finally, defendant argues that a new trial is necessary because the prosecutor tried to elicit testimony about a prior diagnosis of pedophilia when cross-examining defense witnesses. No improper testimony was admitted—objections were made and sustained. Defendant's complaint on appeal is that the jury was not contemporaneously admonished to disregard the questions. The jury was, however, instructed at the start and end of trial to ignore questions for which objections were sustained. The court advised the jury: "If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did." Juries are presumed to follow instructions. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) Defendant did not suffer any prejudice from the unanswered questions.

III. DISPOSITION

The judgment is affirmed.

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Sepulveda, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.